

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: US Wind Inc., for the Maryland Offshore Wind Project Permit Number: Permit-to-Construct 047-0248; NSR-2024-01; PSD Approval PSD-2024-01	Appeal No. OCS 25-01
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**US WIND, INC.'S RESPONSE TO PETITION FOR REVIEW OF THE MARYLAND
DEPARTMENT OF ENERGY'S PERMIT TO CONSTRUCT, PREVENTION OF
SIGNIFICANT DETERIORATION APPROVAL, AND NONATTAINMENT NEW
SOURCE REVIEW APPROVAL FOR THE MARYLAND OFFSHORE WIND
PROJECT**

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I. INTRODUCTION

The Environmental Appeals Board (“EAB”) does not have jurisdiction to adjudicate third-party challenges to an air permit issued by an approved state for a facility located on the Outer Continental Shelf (“OCS”) adjacent to that state. The permit challenged by Petitioners here was issued by the Maryland Department of the Environment (“MDE”) for the construction of a wind energy project proposed by respondent US Wind, Inc. (“US Wind”) off the coast of Maryland (hereinafter, “the MDE Permit”). Because the MDE Permit was issued pursuant to Maryland state law, regulations, and permitting procedures for which the state has received approval and delegated authority from EPA under the Clean Air Act (“CAA”), Petitioners’ objections to the MDE Permit must be lodged in Maryland courts, not the EAB—and, in fact, Petitioners have already filed a nearly identical petition for review in a Maryland court. Although Petitioners fail to even cite, much less apply, the relevant CAA section on OCS permitting (Section 328), the statute and EPA’s own regulations are clear: the laws of the State of Maryland govern the OCS air permits at issue here, including the process for permitting, final decisions, and appeals. The EAB lacks subject matter jurisdiction to review this final air permit and must therefore dismiss this petition on such grounds. Failure to do so would violate both the CAA and Administrative Procedures Act (“APA”).

While EAB’s lack of jurisdiction over the MDE Permit alone requires denial of the petition, Petitioners’ claims also fail on numerous procedural and substantive grounds, which are addressed in Section IV below. Procedurally, Petitioners raised claims that were not asserted during the Maryland permitting process, and then failed to properly plead them here under EAB rules. Substantively, Petitioners’ claims collectively demonstrate a lack of awareness of air permitting requirements, as each of the six claims Petitioners raise is without merit based on a plain reading

of the CAA, its regulations, the MDE Permit, and the administrative record. Again, Petitioners raise these same issues in a separate petition in Maryland courts, and that is where they must be resolved.

A step back reveals the underlying motives for Petitioners' attempt to bring an MDE-issued air quality permit before the EAB on such flimsy grounds. The Project will generate several gigawatts of renewable energy for decades, and its construction and operation will result in only a tiny fraction of the air emissions that will be avoided by the Project's likely displacement of fossil fuel generation. MDE also thoroughly reviewed the potential air quality impacts from the Project in multiple ways using well-accepted analytics, finding no reason for concern, and Petitioners have not provided any basis to question the validity of that conclusion. Petitioners' challenge to the MDE Permit is thus less about air quality and more about the very existence of the Project.¹ Be that as it may, Petitioners have a right to challenge the MDE Permit, but only in the forum legally authorized to hear them out: a Maryland Circuit Court.

II. FACTUAL AND LEGAL BACKGROUND

a. The US Wind Project.

Respondent US Wind, Inc. ("US Wind") is developing the Maryland Offshore Wind Project (the "Project"), which consists of up to 121 wind turbine generators ("WTGs"), up to four offshore substations ("OSSs"), one meteorological tower, and up to four export cables into onshore substations in Delaware.² Not only is the Project expected to provide approximately 2,000

¹ Indeed, the same Petitioners are also currently challenging most of the Project's other federal permits in a lawsuit filed in October 2024 in the U.S. District Court for the District of Maryland. *Mayor and City Council of Ocean City, Maryland et al. v. U.S. Dep't of the Interior, et al.*, No. 1:24-cv-03111 (D. Md. Oct. 25, 2024).

² Attachment 1, Prevention of Significant Deterioration Approval, Permit No. PSD-2024-01 at 1, 5 (June 6, 2025) ("PSD Permit").

megawatts of energy to the United States grid,³ but it is estimated to create more than 13,000 direct and indirect jobs over the life of the Project.⁴ The air emissions permitted by MDE are almost exclusively from construction and commissioning of the Project, primarily main and auxiliary engines on construction vessels and diesel generators on the OSSs until they are connected to the electrical grid.⁵ Operational emissions will be minimal, primarily consisting of emissions from maintenance vessels and backup generators.⁶ The WTGs themselves will generate no air emissions, and in fact will displace electricity that would otherwise be generated by fossil fuel-powered sources that have historically created significantly more air emissions.⁷ The Project is expected to operate for 35 years, and it is estimated that the Project will fully offset any air emissions generated during construction and commissioning of the Project within four years or less.⁸

The Project and its location have been subject to over 15 years of intensive environmental review at the federal, state, and local level.⁹ The Bureau of Ocean Energy Management (“BOEM”)

³ Attachment 2, Maryland Offshore Wind Project, Outer Continental Shelf Air Permit Application at 2 (Aug. 2023, Rev. Nov. 2023) (“Permit Application (Rev. Nov. 2023)”), <https://mde.maryland.gov/programs/permits/AirManagement/Permits/Documents/US%20Wind/USWindAirQualityPermitApplicationAug2023Nov2023.pdf>.

⁴ Skipjack Offshore Energy, LLC and US Wind, Inc.’s Offshore Wind Applications Under the Clean Energy Jobs Act of 2019, Maryland Public Service Commission, Case No. 9666, Doc. No. 172, US Wind Rebid App. (2024), Appendix 5.1, Offshore Wind Impact Analysis, at 20-21, <https://webpscxb.psc.state.md.us/DMS/case/9666> (last accessed July 29, 2025).

⁵ Attachment 6, Permit to Construct, Part B (Project Sources); Attachment 2, Permit Application (Rev. Nov. 2023), § 2.2.1.

⁶ Attachment 1, PSD Permit, Part D; Attachment 2, Permit Application (Rev. Nov. 2023), § 2.2.2.

⁷ Attachment 2, Permit Application (Rev. Nov. 2023), § 2.2.2.

⁸ Attachment 3, Maryland Offshore Wind Final Environmental Impact Statement, Bureau of Ocean Energy Management (July 2024) (“Final EIS”) at 3-24.

⁹ Attachment 3, Final EIS at Table 1-2, <https://www.boem.gov/renewable-energy/state-activities/maryland-offshore-wind-final-eis> (last accessed July 29, 2025); *see also, generally*, Attachment 4, Final EIS at Appendix A,

within the U.S. Department of the Interior (“USDOIR”) commenced the offshore wind development process off the coast of Maryland in April 2010 with the first meeting of the Maryland Intergovernmental Renewable Energy Task Force, a group of federal, tribal, state, and local government agencies and entities tasked with providing input to BOEM and a forum for discussion as it determined whether and where to plan for offshore wind development off the coast of Maryland.¹⁰ Over the next four years, BOEM regularly convened the task force, which included Petitioners in this case.¹¹ In addition to the Task Force meetings, BOEM solicited public comment at numerous stages during its planning process, including a Request for Interest in November

<https://www.boem.gov/renewable-energy/state-activities/mdoffshore-wind-feis-apparequiredpermits2024july26> (last accessed July 29, 2025).

¹⁰ Bureau of Land Management, First Task Force Meeting (Apr. 14, 2010), <https://www.boem.gov/renewable-energy/state-activities/first-task-force-meeting-april-14-2010> (last accessed July 29, 2025).

¹¹ See BOEM Maryland Activities, <https://www.boem.gov/renewable-energy/state-activities/maryland-activities> (last accessed July 29, 2025); BOEM, *BOEM Maryland Renewable Energy Task Force Membership List* (2018), <https://www.boem.gov/maryland-task-force-members-list> (last accessed July 29, 2025); see also Lists of Attendees for Maryland Intergovernmental Task Force meetings, https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/Attendee_List.pdf (last accessed July 29, 2025) (listing attendees at Apr. 14, 2010 meeting); https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/MD_July_TFmeeting_attendeelist.pdf (last accessed July 29, 2025) (listing attendees at July 14, 2010 meeting); https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/TFmeeting.pdf (last accessed July 29, 2025) (listing attendees at June 24, 2011 meeting).

2010,¹² a Call for Information and Nominations in February 2012,¹³ and a Proposed Sale Notice in December 2013.¹⁴

In 2014, BOEM held a competitive auction for two lease areas, Lease OCS-A 0489 and 0490, totaling approximately 80,000 acres and located off the coast of Maryland. US Wind won this auction and thereby secured the exclusive right to propose an offshore wind farm within these leases through the submission of a Construction and Operations Plan (“COP”) to BOEM.¹⁵ US Wind merged Lease OCS-A 0498 into Lease OCS-A 0490 by amendment effective March 1, 2018 to form one lease (the “Lease”).¹⁶

US Wind conducted several years of extensive surveys and analyses to understand and characterize the Lease, including meteorological, bathymetric, geological, geotechnical, geophysical, biological, archaeological, hazard, and oceanographic surveys—as well as assessments of air quality emissions, visual impacts, navigation and military activities, and historic

¹² *Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Maryland – Request for Interest (RFI)*, 75 Fed. Reg. 68,824 (Nov. 9, 2010), <https://www.federalregister.gov/documents/2010/11/09/2010-28269/commercial-leasing-for-wind-power-on-the-outer-continental-shelf-ocs-offshore-maryland-request-for> (last accessed July 29, 2025).

¹³ *Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Maryland – Call for Information and Nominations*, 77 Fed. Reg. 5,552 (Feb. 3, 2012), https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/Maryland%20Call%20for%20Information.pdf (last accessed July 29, 2025).

¹⁴ *Atlantic Wind Lease Sale 3 (ATLW3) Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Maryland – Proposed Sale Notice*, 78 Fed. Reg. 76,643 (Dec. 18, 2013), <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/FR-Notice.pdf> (last accessed July 29, 2025).

¹⁵ Press release: U.S. Department of the Interior, *Interior Auctions 80,000 Acres Offshore Maryland for Wind Energy Development, Advances President's Climate Action Plan* (Sept. 29, 2021), <https://www.doi.gov/news/pressreleases/interior-auctions-80000-acres-offshore-maryland-for-wind-energy-development-advances-presidents-climate-action-plan#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20As%20part%20of,energy%20in%20federal%20waters%2C%20which> (last accessed July 29, 2025).

¹⁶ Letter from James F. Bennett, Program Manager, Office of Renewable Energy Programs, to Riccardo Toto, President, US Wind Inc. (Mar. 1, 2018), <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/MD/SIGNED-Fully-Executed-Lease-Amendment-OCS-A-0490.pdf> (last accessed July 29, 2025).

properties.¹⁷ This information is contained in US Wind's COP,¹⁸ which US Wind initially submitted to BOEM in August 2020 and revised several times thereafter.¹⁹

Consistent with the National Environmental Policy Act ("NEPA"), BOEM then commenced its process for assessing the potential environmental, social, economic and cultural impacts of the Project by publishing a Notice of Intent to Prepare an Environmental Impact Statement ("EIS") in June 2022.²⁰ BOEM collected public comments and held three public scoping meetings where interested parties were invited to offer feedback and identify issues and potential alternatives for BOEM to consider in the EIS.²¹

BOEM published a draft EIS and initiated a public comment period in October 2023.²² BOEM held two in-person and two virtual public meetings where it accepted comments and offered feedback on issues for BOEM to consider in the Final EIS.²³ BOEM published the Final

¹⁷ Maryland Offshore Wind Construction and Operations Plan at Vol. I, Table ES-1; Vol. II, Appendices A-N, <https://www.boem.gov/renewable-energy/state-activities/maryland-offshore-wind-construction-and-operations-plan> (last accessed July 29, 2025).

¹⁸ *Id.*

¹⁹ Attachment 3, Final EIS, at 1-2.

²⁰ *Notice of Intent to Prepare an Environmental Impact Statement for US Wind's Proposed Wind Energy Facility Offshore Maryland*, 87 Fed. Reg. 34,901 (June 8, 2022), <https://www.federalregister.gov/documents/2022/06/08/2022-12308/notice-of-intent-to-prepare-an-environmental-impact-statement-for-us-winds-proposed-wind-energy> (last accessed July 29, 2025).

²¹ U.S. Department of the Interior, *US Wind Construction and Operations Plan Scoping Summary Report* (July 2022), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/USWind-Scoping-Report.pdf> (last accessed July 29, 2025).

²² *Notice of Availability of a Draft Environmental Impact Statement for US Wind Inc's Proposed Wind Energy Facility Offshore Maryland*, 88 Fed. Reg. 69,658 (Nov. 6, 2023), <https://www.federalregister.gov/documents/2023/10/06/2023-21749/notice-of-availability-of-a-draft-environmental-impact-statement-for-us-wind-incs-proposed-wind> (last accessed July 29, 2025); Bureau of Ocean Energy Management, *Maryland Offshore Wind Draft Environmental Impact Statement (DEIS)* (Oct. 25, 2024), <https://www.boem.gov/renewable-energy/state-activities/maryland-offshore-wind-draft-environmental-impact-statement-eis> (last accessed July 29, 2025).

²³ Attachment 3, Final EIS, at ES-4 – ES-5.

EIS in July 2024,²⁴ which included responses to public comments including those submitted by Petitioners,²⁵ Among the thousands of pages of analysis in the Final EIS is a significant discussion of air quality impacts,²⁶ which MDE incorporated into its subsequent air permit review.²⁷

Appendix A to the Final EIS describes the extensive consultations and public involvement BOEM undertook in the process of its NEPA review, as well as the more than 15 required federal, state, and local permits, consultations and approvals required for the Project.²⁸ Importantly, Appendix A expressly provides that the MDE would issue the instant air permit because EPA delegated full OCS air-permitting authority to the MDE.²⁹ In September 2024, BOEM issued a Record of Decision (“ROD”) documenting the USDOJ’s decision to approve the COP with some

²⁴ See *supra* note 8.

²⁵ Final EIS, Appendix O: Responses to Comments on the Draft Environmental Impact Statement, <https://www.boem.gov/renewable-energy/state-activities/mdoffshore-wind-feisappo-response-comments-deis2024june17> (last accessed July 29, 2025).

²⁶ Attachment 3, Final EIS, at 3-8 – 3-32.

²⁷ Attachment 5, Non-Attainment New Source Review (NSR) Approval Tentative Determination and Fact Sheet, at 9 (incorporating by reference BOEM’s approval of the Construction and Operations Plan).

²⁸ Attachment 4, Final EIS, Appendix A; see also US Wind, Construction and Operations Plan, Volume II, Appendix L.2 (July 1, 2024), (documenting US Wind’s stakeholder engagement outreach) <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/App%20II-L2%20Stakeholder%20Engagement%20%28clean%29%20%28June%202024%29.pdf> (last accessed July 29, 2025).

²⁹ Attachment 4, Final EIS, Appendix A at A-4.

modifications.³⁰ US Wind received its COP approval in December 2024,³¹ along with 80 pages of detailed terms and conditions.³²

US Wind also applied for and obtained an individual permit from USACE allowing, among other things, the construction of structures in navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and the discharge of fill into those waters pursuant to Section 404 of the Clean Water Act. 33 U.S.C. § 1344.³³ This permit authorizes not just US Wind's offshore construction, but also its export cable landfall at the Indian River Substation in Millsboro, Delaware and the construction of an operations and maintenance facility in West Ocean City, Maryland.³⁴

The Project has been subject to an array of other consultations and permitting requirements. BOEM and other cooperating agencies conducted a consultation pursuant to Section 7 of the Endangered Species Act, resulting in May and June 2024 Biological Opinions that assessed the potential effects of construction, operation, maintenance, and decommissioning of the Project on ESA-listed species and identified enforceable mitigation measures and requirements to minimize

³⁰ See Bureau of Ocean Energy Management, *Record of Decision* (Sept. 4, 2024), <https://www.boem.gov/renewable-energy/state-activities/rod-ocs-0490> (last accessed July 29, 2025).

³¹ Letter from David Diamond, Deputy Chief of Operations, Atlantic Outer Continental Shelf, Office of Renewable Energy Programs, BOEM to Riccardo Toto, President, US Wind Inc. (Dec. 2, 2024), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/02_MD%20Wind%20OCS-A%200490%20COP%20Approval%20Letter_%20signed.pdf (last accessed July 29, 2025).

³² US Wind, Inc. Conditions of Construction and Operations Plan Approval (Dec. 3, 2024), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/03_6028_Conditions%20of%20COP%20Approval%20OCS-A%200490.pdf (last accessed July 29, 2025).

³³ Department of the Army Permit NAB-2020-60863-M30 (US Wind, Inc. MD Offshore Wind Energy/FAST-41) (Jan. 3, 2025), https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/US%20Wind%20Permit/NAB-2020-60863.20250106.Final%20Permit%20Ltr.Final_signed2.pdf?ver=-C1ureYjm_ZH4d8pMyPAHQ%3d%3d (last accessed July 29, 2025).

³⁴ *Id.*

impacts to such species.³⁵ The Project also received an Incidental Take Regulation and Letter of Authorization from the National Marine Fisheries Service pursuant to the Marine Mammal Protection Act, setting out a wide range of conditions, mitigation measures, and monitoring and reporting requirements for US Wind's construction activities, including specific mitigation measures for installation of foundation monopiles, construction surveys using specified high-resolution geophysical acoustic sources, and vessel strike avoidance.³⁶ In addition, BOEM consulted with a wide range of stakeholders pursuant to Section 106 of the National Historic Preservation Act to identify historic properties in the Project's Area of Potential Effect and develop a range of measures to avoid, minimize, or mitigate potential impacts.³⁷

In June 2022, US Wind submitted consistency certifications to the States of Maryland and Delaware under the Coastal Zone Management Act, 16 U.S.C. § 1451, providing that the Project was consistent with each state's enforceable coastal zone policies.³⁸ On July 8, 2024, Maryland concurred with US Wind's consistency certification.³⁹ On July 9, the Delaware Department of

³⁵ National Marine Fisheries Service, Endangered Species Act Section 7 Consultation Biological Opinion Construction, Operation, Maintenance, and Decommissioning of the Maryland Wind Offshore Energy Project (June 18, 2024), https://repository.library.noaa.gov/view/noaa/61632/noaa_61632_DS1.pdf (last accessed July 29, 2025); U.S. Fish and Wildlife Service, Biological Opinion for the Maryland Offshore Wind Energy Project (May 2024), <https://www.boem.gov/renewable-energy/state-activities/maryland-wind-bo05292024final> (last accessed July 29, 2025).

³⁶ *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland*, 89 Fed. Reg. 205 (Oct. 23, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-10-23/pdf/2024-22601.pdf> (last accessed July 29, 2025).

³⁷ Attachment 4, Final EIS, Appendix A, at A-8 – A-11.

³⁸ State of Delaware, *Federal Consistency Certification: US Wind Maryland Offshore Project* (Aug. 8, 2023) <https://dnrec.delaware.gov/public-notice/federal-consistency-certification-us-wind-maryland-offshore-project/> (last accessed July 29, 2025); MDE, *US Wind, Inc. Maryland Offshore Wind Federal Consistency Review* (July 8, 2024), <https://mde.maryland.gov/programs/water/WetlandsandWaterways/Pages/US-Wind-Review.aspx> (last accessed July 29, 2025).

³⁹ Letter from Danielle Spendiff, Federal Consistency Coordinator, MDE, to Sindey Chaky, CZMA Coordinator, BOEM, and Jeffrey L. Payne, Director, National Oceanic and Atmospheric Administration (Jul. 8, 2024),

Natural Resources and Environmental Control issued its own concurrence letter, conditioned on compliance with certain measures related solely to its nearshore and onshore activities.⁴⁰ US Wind also engaged with state and local entities over the past several years to obtain the requisite approvals for elements of the Project under state and local jurisdiction.⁴¹

b. EPA Delegation of Air Permitting Authority to Maryland

The MDE Permit was one of the Project’s final required approvals, obtained at the tail end of this lengthy and voluminous review process and issued pursuant to MDE’s fully delegated OCS permitting authority under the CAA. Section 328(a) of the CAA directs EPA to establish certain air pollution control requirements for equipment, activities, or facilities located on the OCS—defined in the Outer Continental Shelf Lands Act to include submerged lands further than three miles from a coastline⁴²—that meet the definition of an “OCS source.”⁴³ The purpose of these requirements is “to [1] attain and maintain Federal and State ambient air quality standards and [2] to comply with the provisions of part C of subchapter I of this chapter [governing PSD permits].”⁴⁴ Section 328 of the CAA requires that for sources located within 25 miles of a state’s seaward

https://mde.maryland.gov/programs/water/WetlandsandWaterways/Documents/CZM/MD%20US%20Wind%20OSW%20Project%20Concurrence_Lease%20OCS-A%200490.pdf (last accessed July 29, 2025).

⁴⁰ Letter from Shawn M. Garvin, Secretary, State of Delaware Department of Natural Resources and Environmental Control, to Laurie Jodziewicz, Senior Director of Environmental Affairs, US Wind (2024), <https://documents.dnrec.delaware.gov/coastal/federal-consistency/us-wind/2022-0088-US-Wind-Offshore-Maryland-Project-CCON-SubE.pdf> (last accessed July 29, 2025).

⁴¹ Attachment 4, Final EIS, Appendix A at A-4 – A-6.

⁴² 43 U.S.C. §§ 1301(a), 1331(a).

⁴³ See 42 U.S.C. § 7627(a)(4)(C), defining an OCS source to include any equipment, activity, or facility which (i) emits or has the potential to emit any air pollutant; (ii) is regulated or authorized under the OCSLA (43 U.S.C. § 1331 *et seq.*); and (iii) is located on the OCS or in or on waters above the OCS, among other specifications and requirements. Additionally, “emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.” *Id.*

⁴⁴ *Id.* § 7627(a)(1).

boundary,⁴⁵ these requirements “*shall be the same as would be applicable if the sources were located in the corresponding onshore area.*”⁴⁶ Pursuant to this mandate, EPA promulgated 40 C.F.R. Part 55, which established requirements to control air pollution from OCS sources in order to attain and maintain Federal and state ambient air quality standards and to comply with the provisions of part C of title I of the CAA.⁴⁷

As discussed in further detail in Section II.a below, the CAA states that “[e]ach State adjacent to an OCS source included under this subsection may promulgate and submit to the Administrator regulations for implementing and enforcing the requirements of this subsection.”⁴⁸ “If the [EPA] Administrator finds that the State regulations are adequate, *the Administrator shall delegate to that State any authority the Administrator has* under this chapter to implement and enforce such requirements.”⁴⁹ By letter dated April 4, 2014, EPA formally delegated to MDE authority to implement and enforce OCS regulations in the Maryland offshore area.⁵⁰ It is under this authority that MDE issued the permit that Petitioners now challenge.

US Wind filed a notice of intent to file an air permit application with MDE, EPA, and the Delaware Department of Natural Resources and Environmental Control (“DNREC”) on August 5,

⁴⁵ “Seaward boundary” is defined as “a line three geographical miles distant from [the state’s] coast line.” 43 U.S.C. § 1312.

⁴⁶ 42 U.S.C. § 7627(a)(1) (emphasis added). The Project is located on the OCS within 25 miles of Maryland’s seaward boundary.

⁴⁷ See *Outer Continental Shelf Air Regulations*, 57 Fed. Reg. 40,792 (1992).

⁴⁸ 42 U.S.C. § 7627(a)(3)

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Delegation of Authority To Implement and Enforce Outer Continental Shelf Air Regulations to the Maryland Department of the Environment*, 80 Fed. Reg. 43,088 (July 21, 2015), <https://www.federalregister.gov/documents/2015/07/21/2015-17850/delegation-of-authority-to-implement-and-enforce-outer-continental-shelf-air-regulations-to-the> (last accessed July 29, 2025).

2022.⁵¹ After consultation with MDE, US Wind filed its air permit application with MDE on November 30, 2023,⁵² and MDE deemed US Wind's application complete on January 4, 2024.⁵³

During MDE's technical review of the permit application, US Wind provided additional information in response to numerous MDE requests.⁵⁴ MDE issued the draft permit accompanied by PSD and NSR approvals on December 4, 2024,⁵⁵ and a public hearing was noticed for January 7, but occurred on the inclement weather date of January 9, 2025 due to a snow event.⁵⁶ Consistent with the administrative process underlying Maryland's delegated authority, EPA reviewed and commented on the draft permits on or about December 21, 2024.⁵⁷ EPA's comments were incorporated into the public record and addressed by MDE both in the response to comments and the final permit.⁵⁸ For the general public, a thirty-day public comment period was set by MDE to run from December 4, 2024 to January 13, 2025, but upon request of a party that period was

⁵¹ 40 C.F.R. § 55.4(a) requires sources located within 25 miles of States' seaward boundaries to submit a Notice of Intent to the EPA Regional Administrator and the air pollution control agencies of the "Nearest Onshore Area" ("NOA") and onshore areas adjacent to the NOA prior to submitting an application for a preconstruction permit.

⁵² Attachment 6, Permit to Construct (June 6, 2025); Attachment 2, Maryland Offshore Wind Project, Outer Continental Shelf Air Permit Application (Aug. 2023, rev. Nov. 2023) ("Permit Application").

⁵³ Attachment 7, Final Determination Concerning a Permit-To-Construct, PSD Approval, and NSR Approval Application Submitted by US Wind, Inc. for the Construction and Commissioning of the Maryland Wind Offshore Project (including MDE Response to Comments) ("Final Determination") at 15.

⁵⁴ Attachment 8, Prevention of Significant Deterioration (PSD) Approval Tentative Determination and Fact Sheet, at 9 – 10.

⁵⁵ *Id.*; see also Delmarvanow.com, *Public Notice from the Maryland Department of the Environment Air and Radiation Administration: Notice of Tentative Determination, Public Hearing, and Opportunity to Submit Written Comments* (Dec. 5, 2024) ("MDE Notice of Tentative Determination and Public Hearing"), <https://www.delmarvanow.com/public-notices/notice/12/05/2024/maryland-department-of-the-environment-2024-12-05-the-worcester-county-times-maryland-19396acf008> (last accessed July 30, 2025).

⁵⁶ *Id.*; see also Attachment 9, Public Hearing Transcript and Comments Received.

⁵⁷ Attachment 9, Public Hearing Transcript and Comments Received, at 114 – 115.

⁵⁸ Attachment 7, Final Determination Comment 16 and Response at 23 – 24.

extended by another 60 days until March 17, 2025.⁵⁹ MDE issued the final permits on June 6, 2025, and provided for the right to appeal until July 14, 2025.⁶⁰ MDE’s review of US Wind’s permit followed the same process that MDE uses for onshore air permits, and the MDE Permit’s Notice of Final Determination stated that any petition for judicial review must be filed in a Maryland Circuit Court.⁶¹

c. Concurrently-Filed Petitions for Review of MDE Permit

Petitioners filed a petition for review of the MDE Permit with the EAB on July 8, 2025, serving US Wind by mail on July 9. In their petition, Petitioners argued that EAB has jurisdiction to review a Maryland-issued air permit, and advanced six substantive critiques of the MDE Permit.

On July 11, 2025, the same Petitioners filed a petition for judicial review in Maryland Circuit Court for Worcester County advancing the identical substantive grounds for review of the MDE Permit as its EAB petition.⁶² Petitioners’ petition for judicial review in Maryland was filed in accordance with the MDE Permit’s instructions,⁶³ and consistent with federal law as discussed

⁵⁹ *Id.* at 2.

⁶⁰ Attachment 6, Permit to Construct at 1; Attachment 1, PSD Permit at 1; Attachment 10, Non-Attainment New Source Review Permit, Permit No. NSR-2024-01 (June 6, 2024) (“NSR Permit”) at 1; Attachment 11, Notice of Final Determination Regarding a Permit to Construct, PSD Approval, and NSR Approval for the Construction and Commissioning of the Maryland Offshore Project (June 6, 2024) (“Notice of Final Determination”); Attachment 9, Public Hearing Transcript and Comments Received at 7:13 – 7:20.

⁶¹ Attachment 11, Notice Of Final Determination; *see also*, MDE, Air and Radiation Permits, Licenses and Approvals, <https://mde.maryland.gov/programs/Permits/AirManagementPermits/Pages/index.aspx> (providing a hyperlink to the “description of the expanded public review process for Air Quality Permits to Construct” <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/Public-Review/ExpandedPublicReviewProcess.pdf>) (last accessed July 31, 2025).

⁶² *In the Matter of Mayor and City Council of Ocean City et al.*, C-23-CV-25-000184 (July 11, 2025).

⁶³ Attachment 11, Notice of Final Determination; Attachment 9, Public Hearing Transcript and Comments Received at 7:13 – 7:20.

further in Section III below. Neither the State of Maryland nor US Wind contests that a Maryland Circuit Courts is the proper jurisdiction for Petitioners' objections to the MDE Permit.

III. THE EAB LACKS JURISDICTION OVER THIS PETITION, WHICH MUST BE HEARD THROUGH MARYLAND STATE REVIEW PROCEDURES

As a threshold and dispositive matter, the EAB is not the correct forum for the Petition. On the contrary, the CAA and EPA regulations governing air permitting for OCS sources require all appeals of MDE-issued permits to follow the procedures established by the State of Maryland. Because Maryland has received EPA approval of its air permitting programs for both onshore and OCS sources, the approved Maryland procedures control, the MDE Permit is final, and the EAB has no jurisdiction to hear this Petition. The EAB's power of review "should be only sparingly exercised," and a petitioner "bears the burden of demonstrating that review is warranted."⁶⁴ Petitioners have failed to carry that burden.

In their attempt to circumvent Maryland's air permit appeal procedures and the MDE Permit's finality, Petitioners have misinterpreted both the CAA and EPA regulations and have cited inapposite judicial opinions involving the application of state employment and contract law on the OCS.⁶⁵ None of Petitioners' arguments overcome the incontrovertible law providing that their appeal of a duly issued Maryland final air permit for an OCS source must be heard in Maryland courts.

a. The Relevant Statutory and Regulatory Provisions Confirm Maryland Procedures Apply to Appeals of MDE-Issued Permits.

The CAA, its regulations, and EPA procedures all make clear that any appeal of the MDE Permit must be heard in Maryland and not by the EAB. As noted in Section II.b above, Section

⁶⁴ *In Re: Powertech (usa) Inc.*, 19 E.A.D. 23, 30 (EAB 2024) (internal citations omitted).

⁶⁵ Petition at 7, note 20 (citing *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601 (2019)).

328 of the Clean Air Act, titled “Air pollution from Outer Continental Shelf activities,” contains two directly on-point provisions that are critical to determining the proper forum for an appeal of a state-issued OCS air permit (and which Petitioners fail to cite).⁶⁶

First, subparagraph (a)(1) of Section 328 directs EPA to establish requirements for OCS sources for two purposes: “[1] to attain and maintain Federal and State ambient air quality standards and [2] to comply with the provisions of part C of subchapter I of this chapter [governing PSD permits].”⁶⁷ Crucially, for sources located within 25 miles of the seaward boundary of most states (including Maryland), the requirements EPA must establish “*shall be the same as would be applicable if the source were located in the corresponding onshore area.*”⁶⁸ For avoidance of doubt, the statute expressly lists the requirements that must be the same for OCS and onshore sources, including “*State and local* requirements for emission controls, emission limitations, offsets, *permitting*, monitoring, testing, and reporting.”⁶⁹

Subparagraph (a)(3) of Section 328, entitled “State procedures,” reinforces this focus on state authority by allowing “[e]ach State adjacent to an OCS source included under this subsection” to “promulgate and submit to the Administrator regulations for implementing and enforcing the requirements of this subsection.”⁷⁰ Furthermore, “[i]f the Administrator finds that the State regulations are adequate, *the Administrator shall delegate to that State any authority*

⁶⁶ 42 U.S.C. § 7627.

⁶⁷ *Id.* § 7627(a)(1).

⁶⁸ *Id.* (emphasis added). The statute treats sources more than 25 miles from states’ seaward boundary differently, but the provisions referenced herein are applicable to the Project, which is an OCS source within 25 miles of Maryland’s seaward boundary.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.* § 7627(a)(3)

the Administrator has under this chapter to implement and enforce such requirements.”⁷¹ EPA is thus *required* to authorize a state to implement their own OCS permitting program if it determines that its program is sufficient.

Section 328, governing the OCS air program, mirrors Section 110 of the CAA, governing state plans for attainment of national ambient air quality standards (“NAAQS”).⁷² Section 110 establishes a “cooperative federalism” approach by authorizing states to develop state implementation plans (“SIPs”) for the same two purposes identified in Section 328: attaining/maintaining the ambient standards and ensuring the prevention of significant deterioration of air quality by issuing PSD permits for individual projects.⁷³ Once EPA approves a SIP under Section 110, appeals of air permits issued by states under the SIP must be heard via state law procedures, not the EAB.⁷⁴ In CAA Section 328, Congress directs the same approach on the OCS: once EPA approves a state’s OCS permitting regulations, appeals of air permits issued by states under their approved OCS regulations are heard under state law, not by the EAB.

Although subparagraph (a)(3) of CAA Section 328 recognizes that “[n]othing in this subsection shall prohibit the Administrator from enforcing any requirement of this section,”⁷⁵ EPA’s retention of its authority to enforce the CAA does not mean that EPA has the authority to

⁷¹ *Id.*

⁷² 42 U.S.C. § 7410.

⁷³ *Id.* §§ 7410(a)(1), (a)(2)(D)(ii); *id.* § 7627(a)(1); *see also Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (characterizing the Clean Air Act as “an experiment in cooperative federalism”).

⁷⁴ *In Re: Delta Energy Center*, 17 E.A.D. 371 (EAB 2017) (dismissing petition for lack of jurisdiction); *see also In Re: Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468, 475 (EAB 2009) (denying review; “For approved programs, appellate review of PSD permits takes an appropriately separate track. The regulation could not be more explicit. ‘Part 124 does not apply to PSD permits issued by an approved [s]tate.’”); *In Re: Carlton, Inc.*, 9 E.A.D. 690 (EAB 2001) (denying review for lack of jurisdiction); *In Re: Milford Power Plant*, 8 E.A.D. 670 (EAB 1999) (dismissing petition for review where PSD permit was issued by a state with an EPA-approved BACT program).

⁷⁵ 42 U.S.C. § 7627(a)(3).

interfere with the implementation of a Section 328-authorized state permitting program to hear a third-party appeal of an individual permit. The Supreme Court has recognized that EPA retains enforcement authority over PSD permits issued by a state under an approved SIP via two methods: issuing administrative orders or filing civil actions.⁷⁶ But EPA’s authority to issue orders and file suits to enforce the CAA is independent of and does not interfere with state procedures for hearing third-party appeals of air permits issued by states under either approved SIPs or approved OCS regulations.⁷⁷

Maryland has received EPA approval of both its SIP and OCS air permit regulations.⁷⁸ Under the EPA-approved Maryland SIP, which applies to onshore sources, the requirements established under Maryland’s PSD and nonattainment NSR rules⁷⁹ govern issuance of air permits.⁸⁰ Under these Maryland regulations, which apply to both onshore and offshore source permit applications, third-party appeals of final permits must be filed in a Maryland Circuit Court.⁸¹

The same result is required for Maryland’s OCS sources because EPA has also approved Maryland’s air regulations for OCS sources within 25 miles of Maryland’s seaward boundary.⁸²

⁷⁶ *Alaska Dept. of Env’tl Conservation v. E.P.A.*, 540 U.S. 461 (2004) (*ADEC*) (recognizing Congress granted EPA “a choice between initiating a civil action and exercising its stop-construction-order authority”).

⁷⁷ *Id.*; see also *In Re: Milford Power Plant*, 8 E.A.D. at 673-74.

⁷⁸ *Outer Continental Shelf Air Regulations Consistency Update for Maryland*, 81 Fed. Reg. 62,393 (Sept. 9, 2016).

⁷⁹ COMAR 26.11.06.14 and COMAR 26.11.17.01 *et seq.*, respectively.

⁸⁰ 40 C.F.R. § 52.1070.

⁸¹ COMAR 26.11.02.11(M).

⁸² *Outer Continental Shelf Air Regulations Consistency Update for Maryland*, 81 Fed. Reg. 62,393 (Sept. 9, 2016); 42 U.S.C. § 7627(a)(1).

Just as the Code of Federal Regulations lists each of Maryland’s SIP-approved regulations as the applicable law for air permitting for on-shore sources, EPA’s OCS regulations at 40 C.F.R. Part 55 adopt Maryland’s regulations that apply to OCS sources, all of which are expressly listed in Appendix A of Part 55—a list that includes the same PSD and nonattainment NSR rules and procedural requirements found in Maryland’s SIP.⁸³ Because EPA has deemed Maryland’s regulations to be adequate and Maryland has fully delegated permitting authority, the Part 55 regulations confirm that EPA’s approval “authorize[s] the State to implement and enforce the OCS requirements *under [Maryland] law*”⁸⁴ and that “the [MDE] shall use *its own procedures*.”⁸⁵

Petitioners cite to other provisions in Part 55 that reference EPA procedures in 40 C.F.R. Part 124,⁸⁶ but those references apply only to *EPA* when *EPA* processes applications and issues permits—and *not* to state-issued permits:

- “*EPA* will follow the applicable procedures set forth elsewhere in this part, in 40 CFR part 124... [d]uring periods of EPA implementation and enforcement of this section[.]”⁸⁷
- “*The Administrator* will follow the applicable procedures of 40 CFR part 71 or 40 CFR part 124 in processing applications under this part. When using 40 CFR part 124, the

⁸³ 40 C.F.R. § 55.14(e)(10).

⁸⁴ *Id.* § 55.11(d) (emphasis added).

⁸⁵ *Id.* § 55.7(f)(1) (emphasis added).

⁸⁶ Petition at 8 – 9.

⁸⁷ 40 C.F.R. § 55.14(c)(4) (emphasis added).

Administrator will follow the procedures used to issue Prevention of Significant Deterioration (‘PSD’) permits.”⁸⁸

- “***The Administrator*** shall comply with the requirements of 40 CFR part 124 and the requirements set forth at § 55.6 of this part.”⁸⁹

As such, these provisions are irrelevant to a final permit issued by MDE.

40 C.F.R. Part 124 is entirely consistent with 40 C.F.R. Part 55 in making clear that EAB lacks jurisdiction over this Petition. The “Purpose and Scope” provision of Part 124 could not be more explicit: “This part does ***not*** apply to PSD permits or 404 permits issued by an approved State.”⁹⁰ By the same token, Part 124’s EAB procedures expressly limit the Board’s jurisdiction to “final permit decision[s] issued under § 124.15 of this part,”⁹¹ and Section 124.15 pertains only to permits issued by a “Regional Administrator.”⁹² The MDE Permit was issued by the state of Maryland, not EPA, in accordance with the state’s that authority. The Part 124 procedures thus do not apply here.

EAB’s current standing order and precedent reflect identical regulatory limits on EAB’s jurisdiction over state-issued final permits. The EAB’s Revised Order Governing Petitions for Review of Clean Air Act New Source Permits (“2020 Order”) explains that the EAB “exercises jurisdiction over petitions for review of certain permits issued by [EPA] and delegated states,”

⁸⁸ *Id.* § 55.6(a)(3) (emphasis added).

⁸⁹ *Id.* § 55.7(f)(1) (emphasis added).

⁹⁰ *Id.* § 124.1(e) (emphasis added).

⁹¹ *Id.* § 124.19(a)(1).

⁹² *Id.* § 124.15(a).

including PSD permits and OCS permits.⁹³ But the 2020 Order makes clear that the EAB’s jurisdiction under Part 124 “does not apply to PSD permits issued by states or eligible Indian tribes under an EPA-approved implementation plan.”⁹⁴ The 2020 Order reflects the plain text of the CAA, EPA procedural regulations, and EAB’s own precedent that reaffirms the EAB “lacks jurisdiction under 40 C.F.R. Part 124 to adjudicate challenges to a PSD permit” when a state, like Maryland, “has obtained EPA approval to administer the PSD program.”⁹⁵

In sum, the CAA mandates that PSD permitting for OCS sources work just like it does for onshore sources: once EPA approves a state’s program, that program governs the procedures for adjudicating third party appeals of state-issued permits, and EPA retains only the authority to enforce CAA requirements, which must be exercised by other means. Because Maryland has obtained EPA approval of both its SIP and OCS regulations, the EAB has no role to play in Petitioners’ appeal. A decision by the EAB to retain jurisdiction would violate the plain text of the CAA, EPA’s own regulations, and the CAA’s “cooperative federalism” principles, which this administration has committed to uphold.⁹⁶

⁹³ Revised Order Governing Petitions For Review of Clean Air Act New Source Review Permits, Per curiam, Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein, at 1, note 1 (Sept. 21, 2020) (“2020 Order”) (citing 40 C.F.R. § 124.1(e)), [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/92bf55cb62d8b6c385258c130058aa79/\\$FILE/NSR%20Revised%20Standing%20Order%202020.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/92bf55cb62d8b6c385258c130058aa79/$FILE/NSR%20Revised%20Standing%20Order%202020.pdf) (last accessed July 29, 2025).

⁹⁴ *Id.*

⁹⁵ *In Re: Delta Energy Center*, 17 E.A.D. 371 (EAB 2017); *In Re: Milford Power Plant*, 8 E.A.D. 670 (EAB 1999) (dismissing a petition for review of a PSD permit where the contested provisions were issued “pursuant to [the state’s] status as a state with an EPA-approved BACT program,” and incorporated into the state’s SIP, such that “the relevant provisions of the permits at issue are thus creatures of state law that the Board lacks jurisdiction to review.”)..

⁹⁶ Press release: U.S. Environmental Protection Agency, *Administrator Zeldin Takes Action to Prioritize Cooperative Federalism, Improve Air Quality Faster*, (Mar. 12, 2025), <https://www.epa.gov/newsreleases/administrator-zeldin-takes-action-prioritize-cooperative-federalism-improve-air> (last accessed July 29, 2025).

b. The Legal Authority Petitioners Cite in Support of their Claim that the EAB Has Jurisdiction Over Their Appeal Is Inapplicable.

Ignoring the dispositive authorities discussed above, Petitioners base their jurisdictional argument on a blatant misreading of isolated provisions of EPA’s Part 55 OCS air regulations, as well as two cases addressing the applicability of state employment and contract law on the OCS.⁹⁷ These arguments fail on their face.

First, Petitioners assert that EPA maintains “continuing federal oversight” via 40 C.F.R. § 55.6(a)(5), which requires a state permit applicant and the delegated state agency to send EPA copies of all “permit applications, public notices, preliminary determinations, and final actions.”⁹⁸ But a requirement to essentially “cc:” EPA does not give EPA any authority over the state permits themselves. If anything, the fact that EPA is only entitled to a “copy” of the state’s work confirms EPA is not the relevant permitting authority in this case.

Second, Petitioners also appear to cite 40 C.F.R. § 55.6(a)(3), which references Part 124. But as noted in Section III.a above, that section only applies where the *EPA Administrator* is the one “processing applications” or “issu[ing]” PSD permits. Third, Petitioners claim that MDE failed to comply with 40 C.F.R. § 55.13. But that provision sets forth “*federal* requirements” that apply to sources greater than 25 miles from a state’s seaward boundary or adjacent to states without an approved state program, where EPA is the permitting authority and EPA’s own PSD regulation (40 C.F.R. § 52.21) applies.⁹⁹ For a source like the Project that is within 25 miles of a state’s seaward boundary and adjacent to an approved state, the relevant provision of Part 55 is 40 C.F.R.

⁹⁷ Petition at 6 - 10.

⁹⁸ Petition at 9.

⁹⁹ 40 C.F.R. § 55.13(d).

§ 55.14, not 40 C.F.R. § 55.13.¹⁰⁰ In any event, Petitioners’ argument on this point is not jurisdictional, but rather addresses which regulatory requirements should apply to the MDE Permit—something that can and must be addressed in Maryland courts.¹⁰¹

Petitioners’ last hope for seeking EAB jurisdiction over their appeal of the US Wind permit is an inapposite Supreme Court case (plus one Federal Circuit case relying on it) addressing the generalized question of whether and when Federal laws or the laws of an adjacent state apply on the OCS under the Outer Continental Shelf Lands Act (“OCSLA”).¹⁰² What the Petitioners miss is that the provisions of OCSLA only apply “[t]o the extent that they are applicable and not inconsistent with . . . other Federal laws[.]”¹⁰³ The CAA is exactly the kind of “other Federal law” that overrides the more general structure of OCSLA, as CAA Section 328 expressly states that “[t]he authority of this subsection shall supersede section 5(a)(8) of the Outer Continental Shelf Lands Act [43 U.S.C. § 1334(a)(8)].”¹⁰⁴ Accordingly, the specific requirements and procedures established in CAA Section 328 and its regulations control in this CAA case, and the cited court opinions are inapposite.

¹⁰⁰ 40 C.F.R. § 55.14 is titled “Requirements that apply to OCS *sources located within 25 miles of States’ seaward boundaries, by State.*” (emphasis added).

¹⁰¹ Petitioners also quote 40 C.F.R. § 55.11(g) for the broad proposition that EPA “retains oversight under its Outer Continental Shelf Air Regulations.” Petition at note 18. But the cited provision is not relevant to EPA’s authority over a specific permit, let alone a state-issued permit.

¹⁰² See *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 601-3 (2019) (holding that state minimum wage does not apply on the OCS); see also *Taylor Energy Co. LLC v. United States*, 975 F.3d 1303, 1305-6 (Fed. Cir. 2020) (relying on *Parker Drilling* holding that state contract law does not apply on the OCS).

¹⁰³ 43 U.S.C. § 1333(a)(2)(A).

¹⁰⁴ 42 U.S.C. § 7627(a)(1).

c. EAB Taking Jurisdiction Over This Petition Would Constitute a Violation of the Administrative Procedures Act.

EAB review of the MDE Permit would be “arbitrary, capricious, an abuse of discretion, or not in accordance with law” in violation of the APA.¹⁰⁵ For the various reasons set forth in Section III.a and b above, any challenges to a final air permit issued by a state pursuant to a proper delegation of authority from EPA must be heard in state proceedings. By taking jurisdiction over this Petition, EAB would be acting in direct contravention of the CAA, its implementing regulations on the OCS, and EPA’s own procedures—as well as administratively re-opening a final permit decision without a proper legal basis. This is precisely the type of unlawful agency action prohibited by the APA.¹⁰⁶

IV. EVEN IF THE EAB HAD JURISDICTION, PETITIONERS’ CLAIMS ARE PROCEDURALLY DEFECTIVE AND WITHOUT SUBSTANTIVE MERIT

EAB must dismiss the Petition for lack of jurisdiction, but even if the EAB had jurisdiction, the Petition would fail both procedurally and on its merits. Petitioners’ six substantive claims can be disposed of on procedural grounds, either because the claims were not raised during the extensive comment period for the draft MDE Permit, because Petitioners failed to properly cite the administrative record in their Petition, or both. Even if those serious procedural defects are ignored, each of the six claims would fail substantively—and decisively—for the reasons set forth below.

¹⁰⁵ 5 U.S.C. § 706(2)(A).

¹⁰⁶ See, e.g., *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990), citing *Service v. Dulles*, 354 U.S. 363 (1957) (“The failure of an agency to follow its own regulations is challengeable under the APA.”).

a. Procedural Defects Are Fatal to Petitioners' Substantive Claims.

Before even reaching the merits of Petitioners' claims, the EAB (if it had jurisdiction) must determine whether the claims were properly raised in comments during the permitting process.¹⁰⁷ Most of Petitioners' claims fail this test and therefore cannot be raised for the first time on appeal.¹⁰⁸ Claims 1, 3, 4, and 5 were never raised during public comment, and Petitioners do not explain or justify that void in their filing.

Under the EAB's governing regulations and 2020 Standing Order, Petitioners must also cite the administrative record where each claim was raised and explain why the permitting agency's response was "clearly erroneous or otherwise warrants review,"¹⁰⁹ or explain why their claims were not raised during the comment period.¹¹⁰ This defect sinks all of Petitioners' claims, including the two—claims 2 and 6—that were arguably raised in the public comment period (albeit not by Petitioners themselves).¹¹¹

¹⁰⁷ See, e.g., *In Re: Town of Concord Department of Public Works*, 16 E.A.D. 514, 527 (EAB 2014) (petitioner failed to preserve claims on appeal to the EAB when it "cit[ed] no comments nor explain[ed] why the issues need not have been raised.")

¹⁰⁸ *Id.*, 526 (where petitioners "make[] no attempt in its petition or reply brief to show that it or any other commenter submitted comments on [an] issue or to explain why it was not necessary to raise the issue in the public comment period" they "fail[] to comply with the requirements of section 124.19(a)(4)(ii). The issue is therefore waived.").

¹⁰⁹ 40 C.F.R. § 124.19(a)(4)(ii).

¹¹⁰ 2020 Order, *supra* note 93.

¹¹¹ See generally, Attachment 7, Final Determination (responding to comments regarding emissions modeling, vessel emissions generally, and timely issuance of air permits); see also, e.g., *In Re: Town of Concord Department of Public Works*, 16 E.A.D. 514, 544-45 (EAB 2014) ("these matters were not raised during the comment period, although they could have been. ... [t]hus they are not preserved for review by the Board"); *In Re: General Electric Co.*, 18 E.A.D. 575, 636 (EAB 2022) ("[T]he requirement to raise issues during the public comment period is not an 'arbitrary hurdle' but serves important purposes such as 'ensur[ing] that the permit issuer has the first opportunity to correct any potential problems in the draft permit [and] that the permit process itself will have finality.'"); *In Re: Peabody Western Coal Company*, 15 E.A.D. 406 (EAB 2011) (denying review in part for petitioners' failure to address the permit issuer's responses to comments similar to those raised in the petition for review); *Hecla Mining*, slip op. at 10, 13 E.A.D. 216 (EAB 2006) (denying review for failure to show any clear error, abuse of discretion, or important policy matter warranting board review); *In Re: District of Columbia Water and Sewer Authority*, 13 E.A.D. 714 (EAB

In short, even if EAB had jurisdiction, the Petitioners' claims should be dismissed strictly on procedural grounds.¹¹²

b. The MDE Permit Appropriately Imposes the Requirement to Obtain a Title V Operating Permit.

Petitioners contend in their first claim that the permit to construct and PSD and NSR approvals violate Title V of the CAA, because the permit allows the Project to begin operations while construction is still underway and allows US Wind to wait 12 months before submitting an operating permit application.¹¹³ This claim fails because the CAA, its implementing regulations, and MDE regulations explicitly allow US Wind up to 12 months after the MDE Permit takes effect to apply for a Title V permit.

The CAA prohibits a major source from operating unless it is in compliance with an issued Title V permit,¹¹⁴ and also states that a major source is required to have a Title V permit on the date that it becomes subject to Title V permitting requirements.¹¹⁵ But Petitioners fail to cite the decisive provision of the CAA providing a “deadline” of “not later than 12 months after the date on which the source becomes subject to” Title V requirements for submittal of a permit application (or on such earlier date as the permitting authority may establish).¹¹⁶ The CAA goes on to specifically provide that “[no] source required to have a permit under this subchapter shall be in

2008) (denying review in part for failure to demonstrate why permitting agency's response to comments were clearly erroneous or otherwise warranted review).

¹¹² Petitioners' choice to fully ignore the Board's pleading requirements laid out in Part 124 and the Board's 2020 Standing Order for Review of CAA NSR Permits potentially warrants sanctions under 40 C.F.R. § 124.19(n). Alternatively, the Board may choose to decline review without issuing an opinion. 2020 Order, *supra* note 93, at 5.

¹¹³ Petition at 10 – 12.

¹¹⁴ 42 U.S.C. § 7661a(a).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 7661b(c).

violation of section 7661a(a) of this title *before the date on which the source is required to submit an application* under subsection (c).”¹¹⁷

EPA’s Title V regulations mirror the CAA’s 12 month deadline for a permittee to submit a Title V permit application after becoming subject to Title V requirements, or on or before such earlier date as the permitting authority may establish.¹¹⁸ The MDE, the permitting authority for the Project, also has its own Title V permit regulations that require submittal of a permit application not later than 12 months after the date the source commences operations or becomes subject to the requirement to obtain a Title V permit, whichever is later.¹¹⁹

By requiring submittal of a Title V permit application within 12 months of commencing operation, the MDE Permit is fully consistent with the CAA and federal and state implementing regulations.

c. The MDE Permit Is Valid Even Though Issued After the One-Year Deadline Prescribed in the Clean Air Act.

Petitioners allege in their second claim that the MDE Permit is invalid because it was granted more than one year after US Wind submitted a complete application.¹²⁰ But the one-year statutory deadline in Section 165(c), 42 U.S.C. § 7475(c) (which is routinely missed by state and local air permitting authorities due to the complexity of PSD permits and associated modeling) is for the *benefit of permittees*, to ensure timely issuance of their permit so they can begin

¹¹⁷ *Id.* § 7661b(d) (emphasis added).

¹¹⁸ 40 C.F.R. § 70.5(a)(1)(i).

¹¹⁹ COMAR 26.11.03.02(B)(4).

¹²⁰ Petition at 12 – 13, citing 42 U.S.C. § 7475(c).

constructing a project that would be prohibited without that authorization.¹²¹ Accordingly, it would make no sense for the remedy for failure to issue a timely PSD permit to be even more delay, which is exactly what would result if Petitioners succeeded on this claim.

Far from prohibiting states from issuing a late permit, Congress provided a cause of action via Section 304 of the CAA for third parties to force EPA and permitting authorities to take mandatory actions that are “unreasonably delayed.”¹²² The district courts, which have jurisdiction to hear these types of cases, do not find agency action after the statutory deadline to be *ultra vires*, as petitioners claim, but instead order permitting authorities to take the unreasonably delayed action by a date certain. For example, in a consent decree entered in a Section 304 lawsuit against EPA for missing the Section 165(c) deadline and failing to issue a PSD permit for a full four years after the permit application was submitted, the U.S. District Court for the Southern District of Texas ordered EPA to issue the permit within 45 days of the decree (rather than finding, as Petitioners propose, that EPA no longer had authority to issue the permit).¹²³ This outcome is consistent with the intent of CAA Section 304, which, rather than divesting agencies of authority if they do not act in a timely manner, allows them to be compelled to do so. It is also consistent with other so-called “mandatory duty” lawsuits seeking to force EPA to take action when statutory deadlines have passed.¹²⁴

¹²¹ As discussed below, permittees have invoked Section 165(c) in Section 304 lawsuits against EPA seeking to compel issuance of delayed permits.

¹²² 42 U.S.C. § 7604(a).

¹²³ See Proposed Consent Decree, 73 FR 33087-01, for *Desert Rock Energy, LLC and the Diné Power Authority v. EPA*, Civ. No. 08-872 (S.D. TX June 11, 2008), <https://www.federalregister.gov/documents/2008/06/11/E8-13064/proposed-consent-decree-clean-air-act-citizen-suit> (last accessed July 31, 2025); see also Consent Decree, *Desert Rock Energy, LLC and the Diné Power Authority v. EPA*, Civ. No. 08-872 (S.D. TX June 3, 2008), <https://www.regulations.gov/document/EPA-HQ-OGC-2008-0488-0003> (last accessed July 31, 2025).

¹²⁴ See, e.g., *Avenal Power Center, LLC v. EPA*, 787 F. Supp. 2d 1, 4-5 (D.D.C. 2011). *New Jersey v. Wheeler*, 475 F.Supp.3d 308, 333-34 (S.D.N.Y. 2020) (directing EPA to promulgate Federal Implementation Plans several

Petitioners claim that because MDE did not meet the statutory deadline imposed by Section 165(c), EPA was required to: (1) issue an objection to the permit for not complying with statutory requirements, (2) send the permit back to the state to correct the problem, and (3) issue the permit itself if MDE did not correct the problem.¹²⁵ Petitioners attempt to support this assertion, however, with citation to statutory provisions associated with an entirely different permitting program, the Title V program.¹²⁶ While the Title V program does require EPA to object to an invalid operating permit, there is no similar provision in the PSD program, and certainly not for a permit that was issued after the statutory deadline.

This disparity in process reflects the distinct differences in the Title V and PSD permit programs. Under Title V, there would be no harm to a permittee associated with the delay of an EPA objection to the permit and remand to the state for reissuance because a source's failure to have a permit is not a violation as long as the permittee has submitted a timely permit application.¹²⁷ The PSD permit program, on the other hand, is a preconstruction permit program, with serious consequences for permittees who experience delays in receiving their permits—which is exactly why EPA has been *compelled* under Section 304 to issue PSD permits that have been delayed beyond the one-year statutory deadline in Section 165(c), rather than prevented from issuing them at all.¹²⁸

states for ozone NAAQS within 8 months); *Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 904 (N.D. Cal. 1984) (mandating EPA to issue radionuclides emission standards within 90 days); *Sierra Club v. Johnson*, 444 F.Supp.2d 46, 61 (D.D.C. 2006) (requiring EPA to promulgate hazardous air pollutant emissions standards within 16 months).

¹²⁵ Petition at 13.

¹²⁶ See *id.*, notes 43 and 44, citing 42 U.S.C. §§ 7661d(b)(2),(3) and 7661d(c).

¹²⁷ 42 U.S.C. § 7661b.(d).

¹²⁸ See *Desert Rock Energy, LLC and the Diné Power Authority v. EPA*, Civ. No. 08-872 (S.D. TX), note 123, *supra*.

For these reasons, Petitioners' claim that MDE lost its authority to issue a permit for the Project after the statutory deadline in CAA Section 165(c) passed is not supported by any legal authority and must be dismissed.

d. MDE Conducted an Adequate Alternatives Analysis.

In their third claim, Petitioners complain that the MDE Permit lacks an alternatives analysis.¹²⁹ This is false: MDE *did* conduct an alternatives analysis in accordance with COMAR 26.11.17.03(B)(6), which adopts verbatim the CAA's statutory requirements.¹³⁰ In consideration of the extensive review process for the Project, much of which is described in detail in Section II.a above, MDE reasonably concluded that "[i]t would be infeasible to locate the Maryland Offshore Wind Project at an alternate site."¹³¹ Petitioners do not even cite to MDE's analysis, let alone explain why it does not meet the requirements of the regulations.

Notably, MDE's analysis explicitly incorporates "[a]n extensive review of site characterization and an assessment of potential impacts [that] was conducted, including environmental, economic, cultural, and visual resources, and use conflicts," conducted "by "State and federal regulatory agencies."¹³² This review included its own robust alternatives analysis in BOEM's Final EIS, which MDE relied upon in its permitting decision.¹³³ Petitioners bear the

¹²⁹ Petition at 14 – 15.

¹³⁰ Attachment 12, Non-Attainment New Source Review (NSR) Approval Final Determination And Fact Sheet, US Wind, Inc. Maryland Wind Offshore Project, ARA Premises No. 047-0248, NSR Approval - NSR-2024-01 ("NSR Approval") at 8-9; 42 U.S.C. § 7503(a)(5).

¹³¹ Attachment 12, NSR Approval at 9.

¹³² *Id.*

¹³³ Attachment 3, Final EIS at Chapters 2, 3; *see also* Attachment 7, Final Determination at 20-22. *See also* Attachment 13, Air Quality Permit to Construct Tentative Determination and Fact Sheet at 16 ("MDE's proposed federal OCS air permit for US Wind *is for the same project BOEM analyzed in the Final Environmental Impact Statement (FEIS)* for the Maryland Offshore Wind Project prepared pursuant to [NEPA] (July 2024, BOEM 2024-

burden of “provid[ing] evidence that the portions of the EIS relied on by [the permitting authority] were clearly insufficient” for purposes of a CAA alternatives analysis.¹³⁴ Here, Petitioners have failed to even acknowledge that MDE conducted an alternatives analysis, let alone explain why its reliance on the substantial analysis of a constellation of other federal and state agencies was insufficient. This claim should therefore be dismissed.

e. The MDE Complied With Relevant Notice and Comment Requirements, and Petitioners Have Waived Their Claims In Any Event.

Petitioners’ fourth claim alleges that the final MDE Permit contains provisions that were not subject to public notice and comment. This claim warrants dismissal for several reasons: MDE provided ample opportunity for public comment, including on the permit provisions that are the target of this claim; Petitioners failed to comment on those permit provisions and have thus waived their ability to bring their complaint before the EAB; the final permit provisions were the logical outgrowth of the draft permit; and the final permit provisions are fully compliant with air quality requirements.

Petitioners had 90 days to comment on the draft permit, 60 days more than required by Maryland law,¹³⁵ and more than required under both of the (inapplicable) notice and comment rules cited by Petitioners.¹³⁶ MDE’s website provided Petitioners and the public updated access to US Wind’s full permit application (including supporting information and application addenda), the Draft Permit, permit approval fact sheets, and external links to a full range of federal agency

0033), and approved in the Maryland Offshore Wind Project of Record Decision (September 2024).” (emphasis added)).

¹³⁴ *In Re: Campo Landfill Project, Campo Band Indian Reservation*, 6 E.A.D. 505, 522 (EAB 1996)

¹³⁵ COMAR 26.11.02.12(F)-(H).

¹³⁶ Petition at 15, note 52 (citing EPA’s Title V regulations at 40 C.F.R. § 70.7(h), which are not applicable to the permit) and 16 note 56 (citing 40 C.F.R. § 124.10 (which, as explained above, is inapplicable)).

evaluations of the Project.¹³⁷ In short, MDE was fully transparent throughout its public participation process and followed its procedures to a tee.¹³⁸

Petitioners, who by their own words have been criticizing the project for “over seven and a half years,”¹³⁹ had ample opportunity to provide “fair and thoughtful public comment” during the MDE’s public participation process.¹⁴⁰ Petitioners nonetheless failed to avail themselves of the opportunity to provide feedback on the emissions data and modeling submitted by US Wind and approved by MDE. Even today, the Petition cannot articulate why US Wind’s air emissions modeling data or MDE’s analysis were flawed. Instead, Petitioners grossly misrepresent the facts. Petitioners first claim that “numerous commenters raised concerns about the completeness and accuracy of US Wind’s emissions estimates,” but they cite to only one commenter who did not express any such concern.¹⁴¹ Next, they allege that MDE “acknowledged that the application was inaccurate,” but the quote Petitioners pull from MDE’s response to comments in support of that contention does not support this allegation.¹⁴² Rather, the cited quote merely explains that US

¹³⁷ Documents available at <https://mde.maryland.gov/programs/permits/AirManagementPermits/Pages/U.-S.-Wind-Maryland-Offshore-Wind-Project.aspx> (last accessed July 29, 2025); *see also* Section II.a above.

¹³⁸ Attachment 9, Public Hearing Transcript and Comments Received at 5:5-7:20 (Ms. Shannon Heafy, Air Quality Permits Program Public Participation Coordinator, explaining where to find the Permit materials, how to participate in notice and comment, and MDE’s process for evaluating comments); *see also*, <https://mde.maryland.gov/programs/permits/AirManagementPermits/Documents/Public-Review/ExpandedPublicReviewProcess.pdf> (last accessed July 29, 2025) (describing the “MDE Public Participation Process”).

¹³⁹ Petitioner Rick Meehan claims to have been criticizing the project for “over seven and a half years.” Attachment 9, Public Hearing Transcript and Comments Received at 32:17-33:7 (included with Petition as Attachment 4).

¹⁴⁰ Petition at 16.

¹⁴¹ Petition at 15, note 53. Petitioners misrepresent Delegate Wayne Hartman’s oral comment; he asked MDE to “clarify” the amount of emissions the Project would emit, and alleged generally, without support, that the project would “seriously endanger[]” the ocean and the air. Attachment 9, Public Hearing Transcript and Comments Received at 24-27.

¹⁴² Petition at 16, note 54.

Wind must confirm to MDE that it has obtained sufficient emissions offsets to satisfy the CAA and Maryland regulations before beginning construction.¹⁴³

Finally, Petitioners claim that MDE violated federal public notice requirements by relying on new data submitted by US Wind that had never been open to public review or comment to craft the terms of its final permit and approvals.¹⁴⁴ While the final permit issued by MDE differed from the draft permit, that outcome is contemplated by federal administrative law and the draft permit itself.

A final permit need not be the mirror image of the draft permit; indeed, “[t]hat would be antithetical to the whole concept of notice and comment.”¹⁴⁵ Requiring a permitting agency to open a new comment period after every material change to a draft permit made in response to a solicitation for comment would create an endless process doom loop under which permits could never be issued.¹⁴⁶ Notice and comment has been satisfied so long as the final permit is a “logical outgrowth” of the draft permit.¹⁴⁷ An agency fails to provide adequate notice and comment with respect to a permit only if the final permit deviates “materially and substantially” from a draft

¹⁴³ Attachment 7, Final Determination at 6 – 7.

¹⁴⁴ Petition at 16.

¹⁴⁵ *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002); *In Re: District of Columbia Water and Sewer Authority*, 13 E.A.D. at 759.

¹⁴⁶ *In Re: District of Columbia Water and Sewer Authority*, 13 E.A.D. 714 (EAB 2008); *In the Matter of: Chem-Security Systems, Inc.*, 2 E.A.D. 804, note 11 (EAB 1989) (denying request to re-open public comment. “It is entirely appropriate for a public comment period to result in changes to the [permit issuer’s] decisional basis, the record, or the draft permit itself.”)

¹⁴⁷ *NRDC*, 279 F.3d at 1168 (*quoting NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988)).

permit “in a way that was not reasonably foreseeable.”¹⁴⁸ Moreover, the EAB affords permit issuers “substantial deference” on their decisions not to reopen a comment period.¹⁴⁹

In the present case, the draft MDE Permit *specifically provided for* future revisions to the limits on simultaneous operation of the vessels that were revised in the Final Permit, making the changes about which Petitioners complain both consistent with the draft MDE Permit and “reasonably foreseeable” for purposes of determining whether the final MDE Permit was a logical outgrowth of the draft. The Operating and Monitoring Requirements in Part E(3) of the Draft Permit¹⁵⁰ allowed US Wind to operate vessels for one operation at a time “unless [US Wind] can demonstrate, by conducting additional emissions modeling approved by the Department,” that simultaneous vessel operations would comply with both the NAAQS and PSD increments.¹⁵¹ The revision was reasonably foreseeable because the draft MDE Permit expressly contemplated it, and it was thus a logical outgrowth of the draft. Petitioners also had a full and fair opportunity during the public comment period to raise concerns about this draft MDE Permit provision and did not.¹⁵²

¹⁴⁸ *In Re: District of Columbia Water and Sewer Authority*, 13 E.A.D. at 757.

¹⁴⁹ *In Re: Town of Concord Department of Public Works*, 16 E.A.D. at 531 (EAB 2014) (internal citations omitted).

¹⁵⁰ Surprisingly, Petitioners did not include the Draft Permits as attachments to their Petition, which are *essential* for the EAB to resolve claims concerning the differences between a Draft and Final Permit.

¹⁵¹ Attachment 8, Prevention of Significant Deterioration Proposed Approval, Part E(3) (Dec. 2024).

¹⁵² Extensive EAB precedent confirms that reasonably foreseeable issues must be raised during the public comment period and are otherwise unavailable for EAB review. *See, e.g., In Re: Town of Concord Department of Public Works*, 16 E.A.D. 514 (EAB 2014) (where the issue of whether to rely on more recent effluent data was “clearly ascertainable” during notice and comment, and therefore waived by petitioners and commenters who did not raise the issue during public comment); *In Re: Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 98 (EAB 2005) (“The Board rejects Petitioners’ argument on procedural grounds because the argument was not raised during the public comment period on the draft permit.”); *In Re City of Moscow, Idaho*, 10 E.A.D. 135, 150 (EAB 2001) (denying a petition for review over claims that were “distinct from” or “not specifically raised in comments below”); *In Re: City of Phoenix, Arizona*, 9 E.A.D. 515 (EAB 2000) (denying review where comments made *before* the public comment period were not made once the comment period was open); *In Re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460 (EAB 2002) (dismissing issues due to petitioner's failure to demonstrate that issues were raised during the public comment period); *In Re: Kendall New Century Dev.*, 11 E.A.D.

During the extended notice and comment period, US Wind submitted a “supplemental NAAQS and PSD increment analysis [which] expanded the modeling analysis to include simultaneous (i.e., cumulative) operation of vessels from separate operations” to MDE on January 24, 2025—exactly as allowed by Draft Permit Part E(3).¹⁵³ MDE approved the emissions modeling and updated Part E’s Operating and Monitoring Requirements and corresponding daily emissions limits accordingly in the final MDE Permit.¹⁵⁴ MDE explained this revision in its Response to Comments, consistent with its public participation procedures.¹⁵⁵

Petitioners also provide no support for their conclusory assertion that MDE’s revisions to the draft MDE Permit “materially changed the underlying analysis and directly affected whether the Project complied with air quality requirements.”¹⁵⁶ In fact, the analysis resulting in the updated daily emissions limits and operating and monitoring requirements in the final MDE permit, like the analysis underlying the limits and requirements in the draft permit, both support the air permitting process’s primary objective of ensuring full protection of air quality as mandated by the CAA. US Wind demonstrated through its supplemental emissions modeling that (a) limits on simultaneous vessel operation were not needed to protect the NAAQS and the PSD increments; and (b) revised daily emission limits to reflect such simultaneous operation complied with those

40 (EAB 2003) (denying review of a new argument raised for the first time on appeal, and denying review of arguments raised during public comment where petitioner failed to show that the permitting agency’s response to comments was “clearly erroneous or otherwise warrante[d] review.”)

¹⁵³ Attachment 9, Public Hearing Transcript and Comments Received, at 160-69 (US Wind’s Comments on MDE draft PSD, NSR and Permit-to-Construct Permits (Jan. 24, 2025)).

¹⁵⁴ Attachment 1, PSD Permit, Table 4 and Part E.

¹⁵⁵ Attachment 7, Final Determination at 2 – 5.

¹⁵⁶ Petition at 16.

same increments.¹⁵⁷ Specifically, MDE reviewed US Wind’s modeling data to “ensure compliance during simultaneous operations for pollutants with respective short-term standards (1- hour and 8-hour CO, 1-hour NO₂, and 24-hour PM-2.5 and PM-10),”¹⁵⁸ and found that “the project impacts” from simultaneous operations “plus background, do not exceed or threaten to exceed NAAQS.”¹⁵⁹ MDE also concluded that simultaneous operations “would not cause or contribute to air pollution in violation of any of the applicable PSD Class II increments” for short-term standards (1-hour and 8-hour CO, 1-hour NO₂, and 24-hour PM-2.5 and PM-10), nor the Class I increments (24-hour PM-2.5 and PM-10).¹⁶⁰ Petitioners do not even acknowledge MDE’s analysis of US Wind’s new modeling data, let alone explain why they think it is flawed.

For the foregoing reasons, EAB should dismiss Petitioners’ fourth claim as both waived and lacking in merit.

f. The CAA and Its Regulations Require Offsets Only for Operation and Maintenance of the Project, not Construction Emissions.

Petitioners’ fifth claim, that MDE failed to require sufficient emissions offsets to cover construction of the Project, must be dismissed because it is inconsistent with the CAA, its implementing regulations, and longstanding EPA policy.

Section 173(a)(1)(A) of the Clean Air Act requires offsets to be obtained only “by the time” the source “commence[s] operation.”¹⁶¹ Because offsets need only be obtained before operation of a source commences, construction activities that *predate* commencement of operations would,

¹⁵⁷ Attachment 9, Public Hearing Transcript and Comments Received, at 160-69

¹⁵⁸ Attachment 7, Final Determination at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 42 U.S.C. § 7503(a)(1)(A).

by definition, not require offsets. EPA recognized this as the best reading of the statute as early as 1977,¹⁶² when it developed its “Emission Offset Interpretive Ruling,” codified shortly thereafter at 40 C.F.R. Part 51, Appendix S, stating that “[t]emporary emission sources, such as ... *emissions resulting from the construction phase of a new source*, are exempt from Conditions 3 and 4 of this section [requiring offsets].”¹⁶³ EPA has since adopted this approach for each offshore wind air permit that it has issued,¹⁶⁴ and MDE followed this approach in its Final Determination for the Project.¹⁶⁵ Petitioners offer no support for a different reading of the relevant CAA provision, nor any rationale for overturning EPA’s longstanding interpretation of it. EAB must therefore dismiss this claim.

g. US Wind’s Emissions Limits Are Based on Rigorous Emissions Modeling Consistent With the Clean Air Act and Its Implementing Regulations.

Petitioners’ sixth and final claim rests on the vague allegation that MDE should have relied on “verified emissions data” or “real data” in issuing the permit.¹⁶⁶ This claim represents a fundamental misunderstanding of preconstruction air permitting.

¹⁶² EPA Letter to Dr. Robert L. Davies, Federal Energy Administration (May 6, 1977), www.epa.gov/sites/default/files/2015-07/documents/emsnofst.pdf (last accessed July 29, 2025).

¹⁶³ 40 C.F.R. Part 51, Appendix S (emphasis added).

¹⁶⁴ See, e.g., Supplemental Fact Sheet for the South Fork Wind Farm permit, www.epa.gov/system/files/documents/2023-07/South%20Fork%20Wind%20LLC%20Supplemental%20Fact%20Sheet.pdf (last accessed July 29, 2025); Revolution Wind Outer Continental Shelf Air Permit, at 21 (Sept. 28, 2023), <https://www.epa.gov/system/files/documents/2023-09/rw-ocs-air-permit-ocs-r1-05-final-permit.pdf> (last accessed July 29, 2025); Empire Offshore Wind Outer Continental Shelf Air Permit, at 42 (Feb. 15, 2024) <https://www.epa.gov/system/files/documents/2024-02/final-permit.pdf> (last accessed July 29, 2025).

¹⁶⁵ See, e.g., Attachment 7, Final Determination at 6 – 7 (“Citing Clean Air Act Section 173 (a)(1)(A) and Section 173 (c)(1), as well as 40 C.F.R. Part 51, Appendix S, EPA has determined that offsets apply only to emissions during operation and maintenance. In keeping with these practices, for the Maryland Offshore Wind Project, offsets are required based on operation and maintenance emissions.”)

¹⁶⁶ Petition at 18 – 19.

Preconstruction air permitting, including NSR and PSD permits for OCS sources, requires permit applicants and agencies to rely on emission estimates and modeling precisely because the CAA requires these permits to be issued *before* a project begins construction. By definition, “verified emissions data” from the actual project cannot be obtained prior to issuance of the permit and the ensuing construction of the project. But high-quality data is still available to inform the permitting analysis. Indeed, BOEM created an Offshore Wind Energy Facilities Emission Estimating Tool Technical Documentation, referred to as the “BOEM Wind Tool” for the express purpose of “easily quantify[ing] emissions associated with proposed actions and assess[ing] the associated benefits of offshore wind energy facilities.”¹⁶⁷ US Wind submitted robust emissions modeling data to MDE based on BOEM’s Wind Tool methodology, using real data about real vessels from other recently approved OCS air permits to calculate projected emissions.¹⁶⁸ Nothing more was required—or, more importantly, even possible.

Petitioners, for their part, fail to explain what emissions data would be more “verified,” “actual,” or “real” than the data that US Wind submitted and MDE relied upon. Moreover, the authorities on which they rely are inapposite. The statutory provision they cite, 42 U.S.C. § 7503(a), articulates the general requirement that a proposed new source must comply with applicable emissions limitations and standards, but it says nothing about the data that must support such a demonstration. Nor does their cited case, *New York v. EPA*,¹⁶⁹ which involved a challenge to a proposed rule relating to EPA’s “reasonable possibility” recordkeeping requirements for

¹⁶⁷ Offshore Wind Energy Facilities Emission Estimating Tool Technical Documentation at 1 (2021), <https://www.boem.gov/sites/default/files/documents/about-boem/BOEM-Wind-Power-User-Guide-V2.pdf> (last accessed July 29, 2025).

¹⁶⁸ Attachment 2, Permit Application (Rev. Nov. 2023), at 2-7, 2-12.

¹⁶⁹ 413 F.3d 3, 34 (D.C. Cir. 2005).

modifications of existing emissions sources and has no bearing whatsoever on the adequacy of emissions information for a proposed new source seeking a construction permit. Because Petitioners' claim is ambiguous, inconsistent with reality, and unsupported by law, it must be dismissed.

V. CONCLUSION

The Petition challenges a Maryland permit and must therefore be heard in Maryland court—and not before the EAB. Accordingly, the EAB must dismiss it as non-jurisdictional. Even if the EAB had jurisdiction to consider a Maryland permit, however, Petitioners' claims are procedurally and substantively meritless and should be dismissed on those bases as well.

Dated: August 1, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I certify that this Response to the Petition for Review is 11,818 words in length and therefore complies with the word limitation of 14,000 words in 40 C.F.R. § 124.19(d)(3).

/s/ Toyja E. Kelley

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing in the matter of US Wind Inc., for the Maryland Offshore Wind Project, Permit-to-Construct 047-0248; NSR-2024-01; PST Approval PSD-2024-01, was filed with the Environmental Appeals Board through its e-filing system on August 1, 2025, and were served on the following parties in the manner indicated.

By first-class U.S. mail to Lee Zeldin, Administrator of the United States Environmental Protection Agency, at Environmental Protection Agency, Office of the Administrator 1101A, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460 on August 1, 2025;

By first-class U.S. mail to Amy Van Blarcom-Lackey, Regional Administrator of Region 3 of the Environmental Protection Agency, at 4 Penn Center, 1600 JFK Blvd., Philadelphia, PA 19103-2029, on August 1, 2025;

By first-class U.S. mail to the Maryland Department of the Environment, at 1800 Washington Blvd., Baltimore, Maryland 21230, on August 1, 2025; and

By first-class U.S. mail to counsel for Petitioners, Nancie G. Marzulla and Roger J. Marzulla of Marzulla Law, LLC at 1150 Connecticut Ave., NW, Suite 1050 Washington, D.C. 20036 on August 1, 2025.

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